IN THE

Supreme Court of the United States

OCTOBER TERM 1970

NO. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER CO.,

Appellees.

BRIEF OF APPELLEE ROBERT L. SHEVIN

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STATEMENT OF THE CASE

Appellee Robert L. Shevin, Attorney General for the State of Florida,

respectfully disagrees with the Statement of the Case as presented in Appellant's Brief, not for reason of inaccuracy, but for failure to set out in detail facts which put this controversy into proper perspective. The following statement is based upon the Stipulation considered by the court below (A 24-29).

Appellant, Mrs. Margarita Fuentes had made six installment purchases from Firestone on time-payment contracts previous to the one giving rise to this action and had paid for them. Although Appellant was unable to stipulate to the following details which describe these installment purchases, Firestone contends the following based upon its credit records:

Mrs. Fuentes applied for credit with Firestone on January 31, 1964. She represented herself as a 49-year-old divorcee who had lived at 137 S.W. 10th Avenue, Miami, for five months. She had been employed by Geneie of Miami, an apparel factory, for one and a half years as a sewing machine operator. She was paid $60.00 per week. She had very good credit reference with Ideal Trading Co., Inc., which indicated a credit history dating from 1962. Firestone approved her. The next day she bought a console T.V. and took out a service policy. A year later, she bought a toaster, and in the fall of the following year, she bought a refrigerator.

On October 30, 1965, Mrs. Fuentes

opened another account with Firestone. Her address was then 1275 S.W. 1st Street. She purchased two bicycles. She paid for them in fourteen installments.

She next applied for credit with Firestone on March 29, 1967. She represented that she had rented a home at 112 S.W. 11th Avenue, Miami, Florida, for longer than a year, and that she had been employed by Mr. Dino's as a sewing machine operator for a year with a monthly salary of between $300.00 and $399.00. Her credit references and employment were verified. A credit limit was granted of $495.00.

On June 24, 1967, Mrs. Fuentes purchased from Firestone a gas stove for $139.95 together with a $14.95 policy assuring her free service for one year. With sales tax of $4.66, handling charges of $20.67 and documentary stamp of $.30, the total time balance was $180.53, to be paid in 17 equal installments of $11.00 (A 24-25).

During the course of approximately one year from the date of her purchase, Mrs. Fuentes complained on more than one occasion of mechanical problems with her stove. Firestone asserted that satisfactory repairs were made which included replacement at no charge to Mrs. Fuentes of stove burners. Mrs. Fuentes alleged that if such repairs were made, they were not made to her satisfaction. Firestone denied this allegation (A 25).

On November 27, 1967, Mrs. Fuentes purchased from Firestone a Philco stereo set for $398.75 and a service policy of $12.50. Documentary stamp charges of $.90 and sales taxes of $12.47 brought the net cash price to $424.62. A down payment of $40.00 was made, leaving a net cash balance of $384.62. The balance remaining unpaid on her gas stove ($136.53) less a refund of part of the handling charge ($10.20) brought the total cash balance for both the gas stove and stereo to $510.95. To this was added a new handling charge of $101.80 for a total time balance of $612.75 for both the gas stove and stereo, to be paid over 24 months commencing December 2, 1967. Each installment was to be in an amount of $26.00 (A 24).

On February 6, 1968, Mrs. Fuentes made a payment in the amount of $30.00. She made $30.00 payments on March 15, and April 9. On May 21, she made a $26.00 payment, and on June 5, a $6.00 payment. On July 3, she paid $20.00. On July 15, she made a payment of $208.70 (A 24).

The effect of this last payment was to prepay installments through March, 1969. The required April, 1969, installment payment in the sum of $26.00 was not made. A notice was mailed to Mrs. Fuentes The required May, 1969, installment payment in the sum of $26.00 was not paid. A telegram was sent to her on May 12, 1969, to the effect that she was required to pay the past-due account of $204.05 that day, or return the merchandise. The

form telegram was sent by the store credit manager, Mr. John D. Daley. She failed to pay (A 25-26).

On September 15, 1969, Firestone filed in the Small Claims Court in and for Dade County, Florida, under Case No. 205376, the following pleadings:

A. Statement of claim.

B. Affidavit in replevin.

C. Replevin bond.

On September 15, 1969, the date of filing the foregoing pleadings by Firestone, Mrs. Fuentes had not made certain payments according to the conditional sales contract. She was then indebted to Firestone in the total sum of $204.05 as the balance due upon the total purchase price for the gas stove and stereo (A 26).

On September 15, 1969, the Clerk of the Small Claims Court in and for Dade County, Florida, pursuant to the aforelisted pleadings, issued a writ of replevin. Said writ of replevin was delivered on the same date to the office of the Sheriff of Metropolitan Dade County, Florida, for service upon Mrs. Fuentes and execution upon the gas stove and stereo pursuant to the provisions of Chapter 78, Florida Statutes, 1967 (A 26).

On September 15, 1969, at approximately 5:00 o'clock p.m., Robert Arthur Williams, a Deputy Sheriff in the office of the

Sheriff of Metropolitan Dade County, went to the residence of Mrs. Fuentes, located at 112 S.W. 11th Avenue, Miami, Florida, to serve upon Mrs. Fuentes the statement of claim and the writ of replevin and to execute the writ of replevin upon the gas stove and stereo. Two employees of Firestone, Mr. David Daley and Mr. Ricardo Rodriguez, met Deputy Williams at this location with a Firestone truck (A 26-27).

Upon arrival, Deputy Williams went to the door of the Fuentes residence. The main front door was open. A screen door was closed. A woman and two boys were in the living room. Deputy Williams knocked on the door. He asked in English to see Mrs. Fuentes. The person who came to the door was Leonor Delgado, the appellant's daughter-in-law. She does not speak English and apparently did not understand Deputy Williams. At this point, the stories of the parties differ. Deputy Williams alleges that two small boys, Hugo Delgado, age twelve, and Ricardo Delgado, age ten, were within the house and, both being bi-lingual, understood him and invited him in at that time and he entered the living room pursuant to this invitation. Mrs. Fuentes concedes that the boys were within the house and that they are bi-lingual, but denies that the Deputy Sheriff entered the home at that point. Her contention is that Deputy Williams stayed on the porch at this time while the parties spoke through the screen door. She admits and contends that Deputy Williams was invited into the house and entered the house only after Mr. Leon, her

son-in-law, later arrived at her home (A 27).

Deputy Williams mistook Mrs. Delgado for Mrs. Fuentes. Mrs. Fuentes was in the living room at the time. He identified himself and announced that he was there to repossess a stove and a stereo set for Firestone. He showed them the writ and the statement of claim and explained that he was there under court order to pick up the merchandise. There was a difficult communications problem. Neither of the two women seemed to him to speak or understand English. The two boys translated. Gradually, Deputy Williams was able to communicate his purpose and the effect of the writ and statement of claim (A 27).

Mrs. Delgado, who also lived in the house, then became "upset and emotional." She protested the repossession. She asked for Mrs. Fuentes to contact Joaquin Leon, Mrs. Fuentes' son-in-law, who would assist her in the matter. Deputy Williams agreed to wait (A 27-28).

At the request of Mrs. Fuentes, Mr. Leon immediately left work and drove the two blocks from his place of business to the Fuentes residence. He introduced himself in English to Deputy Williams. He explained that his attorney had advised him that a court proceeding was necessary before the merchandise could be repossessed, and that, on his advice, he was not going to give up the property (A 28).

Deputy Williams explained the effect of the writ to Mr. Leon, that he was obliged to repossess the stove and stereo in accordance with its terms. According to Mrs. Fuentes, Mr. Leon then agreed that the Deputy Sheriff, Mr. Daley and Mr. Rodriguez could come into the house and repossess the merchandise. It was indicated to Deputy Williams that the stereo was in the living room and that the gas stove was on an open porch at the back of the house (A 28).

Mr. Daley and Mr. Rodriguez of Firestone had parked the Firestone truck in the driveway of the Fuentes residence and were waiting outside on the front porch. Deputy Williams called them into the living room where he pointed out the stereo. He also directed them to the gas stove. The two men picked up the stereo, took it outside, and loaded it on the truck. They then went to the rear of the house to pick up the gas stove. It was not connected in any way to gas lines or to the house. They carried it to the front and loaded it upon the Firestone truck. Another stove was located in the kitchen of the Fuentes home at the time that Daley and Rodriguez picked up the stereo and gas stove for Firestone (A 28).

Neither Daley nor Rodriguez had any conversation with anyone inside or outside of the Fuentes home other than Deputy Williams. After Mr. Leon agreed that Deputy Williams could repossess the merchandise, no one objected to Daley or Rodriguez repossessing the stove and

stereo. The only conversation which they had with Deputy Williams was, first, in the living room of the Fuentes home, wherein Deputy Williams directed them to the items to be replevied, and, second, on the front porch of the Fuentes home, after they had loaded the merchandise onto the truck, when Deputy Williams requested Mr. Daley to sign a receipt to the Sheriff's office for the gas stove and stereo (A 28-29).

QUESTIONS PRESENTED

I

Whether a statutory scheme of replevin, commencing with judicial process, providing for prejudgment taking of goods into custodia legis, upon posting a bond in double the value of said goods, and providing for a judicial hearing on the merits and recovery to the prevailing party, violates standards of Fourteenth Amendment due process.

II

Whether a statutory scheme of replevin providing authority for officers of the court forcibly to gain entry to a dwelling, building, or other enclosure if necessary, entry having been refused upon demand, for the purpose of executing a writ against specific personalty violates the Fourth Amendment prohibition against unreasonable search and seizure.

SUMMARY OF ARGUMENT

I

Florida's statutory scheme of replevin is not violative of Fourteenth Amendment due process.

Appellant cites inequitable practices of a few to condemn the entire fabric of installment buying. The repossession of household "necessities" judicially forbidden in Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) and the garnishment of wages in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) should be recognized as exceptions to general practices of consumer credit. In no case should Florida's replevin statute be invalidated for reasons described in these cases. Appellant refuses to recognize the salutary effect of the replevin remedy upon our consumer-oriented economy. Relying chiefly upon Sniadach v. Family Finance Corp., supra, Appellant launches her attack upon 700 years of a judicially sanctioned remedy. She depends for success upon this Court's willingness to extend the rule of Sniadach into every instance of prejudgment action brought to protect a creditor interest.

It is the position of the undersigned that the facts of this case do not warrant the result Mrs. Fuentes urges, that the replevin remedy is important to the interests of the State, and that Appellant's reliance upon Sniadach is misplaced.

The history of replevin demonstrates its vitality today. It should not be discarded merely because it is an ancient remedy. Centuries of acquiescence to the remedy in our jurisprudential system indicate validity, not invalidity of the statute. Rather than an archaic buttress to the established order of things designed to favor the rich, the remedy was developed to avoid necessity for self-help in a dispute over the right to possess property. A common-law remedy, statutory enactments are enlarged, rather than restricted, by case law. It is one of the most important forms of action known to our jurisprudence.

The Florida Statute has been reviewed and amended four times within the past two decades.

The purpose of the remedy is to protect property during a judicial dispute over ownership, and, by taking the chattel into custodia legis, preclude necessity for self-help. In its broader sense, the remedy is a vital factor in our consumer-credit economy. Both of these purposes give rise to strong state interest.

Despite Appellant's contention to the contrary, both notice and a meaningful opportunity for hearing "appropriate to the nature of the case" are provided in Chapter 78, Florida Statutes (1969). Weighing the governmental function of protecting property of its citizens and maintaining its economy against the individual's possible temporary loss of

possession of a chattel pending a judicial determination of the merits, the inescapable conclusion is that Florida's Replevin statute offends no Fourteenth Amendment Standard.

The rationale of Sniadach is not appropriate to this case. There is a significant difference between Wisconsin's garnishment laws and Florida's replevin statute, and critical distinctions between the status of the party's rights affected, and type of property involved between the two cases. Moreover, wages garnished in Sniadach were, by definition, owned by the debtor. In the instant controversy, the ultimate rights to own and possess the stove and stereo, or to be paid for them, were, by contract, in Firestone Tire and Rubber Company.

To the extent that the remedy of replevin affords mass-production, installment buying and lower prices as a result, Mrs. Fuentes is a beneficiary of the system she seeks to attack. While neither Sniadach nor Goldberg vs. Kelly, 397 U.S. 254 (1970) could adversely affect the consumer-oriented economy, reversal of this case would have severe repercussions on our economic system.

In view of established judicial approbation of the prejudgment action described herein, it must follow that there is no Fourteenth Amendment violation reflected in Florida's replevin statute.

II

Facts before the Court do not warrant consideration of the Fourth Amendment questions raised by Appellant. The District Court found there to be no Fourth Amendment question raised by the facts before them, nor is there one here. To determine a Fourth Amendment issue when it is not properly before the Court in a matter as far-reaching is this one, is tantamount to stretching jurisdiction of the Court far beyond matters in controversy before it.

But even if the facts warranted consideration of §78.10, Florida Statutes (1969), providing forcible entry, after public demand has been refused, when the chattel to be replevied has been concealed or secreted in a dwelling, Appellant has not accurately described effects of the statute. It does not speak to remedies for mere absence from homes when public demand for entry is made, but to willful attempt to frustrate service and effect of the writ.

Execution of the replevin writ under circumstances when property is intentionally concealed from the sheriff is not unreasonable search and seizure. The writ must describe specific chattels, it must be served upon a specifically designated individual at a specifically described address. The statute limits authority of the sheriff to well within reasonable bounds.

Case law supports Florida's statute against Fourth Amendment attack. Several Supreme Court and lower court cases stand for the proposition that entry upon premises by an officer for the purpose of seizing goods under authority of a judicial writ such as replevin is not forbidden by the Fourth Amendment. Boyd v. United States, 116 U.S. 616 (1866); American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Davis v. United States, 328 U.S. 582 (1945)

The issue is not whether entry is in the context of criminal or civil action, but whether it is, as under the circumstances of the instant case, reasonable.

The District Court found there to be no substantial Fourth Amendment question and no Fourteenth Amendment violation. It should be affirmed.

ARGUMENT

I. Fourteenth Amendment due process does not forbid prejudgment action under a conditional sales contract to assert a prior right of possession of personalty pending trial as provided in Florida's statutory replevin scheme.

A. Preliminary Statement.

While broadening application of the subject statute to factual situations not before the Court, appellant and opposing amici have set narrow limits to their appreciation of (1) the history of replevin, (2) its purpose, and (3) state interest expressed in the statutory scheme of Chapter 78, Florida Statutes (1969). The horizons of their treatment of replevin are picketed by exceptions and fenced in by inequitable practices which, while common to the inner-city experience, are no more illustrative of the rule of consumer credit economy than Warhol's Campbell Soup describes the scope of modern of art. There is more to installment buying than repossessing Mrs. Laprease's bed or halving Mrs. Sniadach's wages just as there is more to the legal profession than sharp practice and more to the banking business than usurious interest charges. To condemn Florida's statutory scheme of replevin for the sins of Wisconsin's garnishment law on the ground that both are infected by the same germ is to throw the baby out with the bath water because both needed changing.

Sensational exceptions are raised to attack the rule. Appellant and opposing amici categorically refuse to recognize the salutary effect of replevin within our installment credit economy. Dazzled by unfair activities of a few urban merchants, they obstinately ignore the obvious: that, although ancient in antecedents, replevin has changed, both in purpose and procedure, from the Statute of Marlbridge, 52 Henry III, Ch. 21 (1267); that reasons for its use today are constructive requisites to an orderly society; and that the state has such a strong interest to protect by Ch. 78, Florida Statutes, that if replevin had not existed before our time, we would have had to invent it to keep pace with demands of the consumer.

Through the Sturm und Drang of legal argument fired broadside from briefs of Appellant and opposing amici there recurs one question of major implication, and that is: how far does this Court intend to extend the thrust of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)? Appellant's attack is launched from the opinion handed down in that case. If the attack is to be sustained, the Court must affirmatively decide that due-process lessons of Sniadach apply to every instance of pre-judgment action against a debtor. For that is what is involved here: pre-judgment service of a writ commanding the servor to take certain specifically described property into custodia legis pending a judicial determination as to which of the two parties had the greater right to possess and use the property.

It is the position of Appellee Robert L. Shevin, that questions raised by Appellant go far beyond the controversy decided by the District Court and should not be considered here, that the history of the legal action of replevin demonstrates its importance to our jurisdiction, that its purpose is important to a productive consumer economy giving rise to a strong state interest, and that the lessons of Sniadach vs. Family Finance Corp., supra, and Goldberg vs. Kelly, 397 U.S. 254 (1970), while validly applied to peculiarities of the type of vested property interest in those cases, are inappropriate to a consideration of the instant appeal.

B. The History of Replevin Describes Its Vitality.

Replevin statutes have been in force in Florida as codified law since 1845. Before then, replevin was accepted procedure under English common law. The earliest authority cited in Florida, Collins v. Mitchell, 5 Fla. 364 (1853); Branch v. Branch, 6 Fla. 314 (1855); Richardson v. Hutchinson, 20 Fla. 21 (1883); Holliday v. McKinne, 22 Fla. 153 (1886), indicates that, except for one clearly marked detour, the basic remedy (and repossession-of-personalty reason for it) hasn't changed much in more than 700 years. Compare Statute of Marlbridge, 52 Henry III, Ch. 21 (1267); Poole v. Longuevill, 3 Saunders Rep. 281 (1680); Shannon v. Shannon, 1 Sch. & Lef. 324 (1804); Chitty's Blackstone, Vol. II, p. 116 (1892); 3 Blackstones Com. 146, with Harman-Hull Co.

v. Burton, 106 Fla. 409, 143 So. 398 (1932); Hughes Trust & Banking Co. v. Consolidated Title Co., 81 Fla. 568, 88 So. 266 (1921); Delacruz v. Peninsula State Bank, 221 So. 2d 772 (Fla. 2nd Dis. 1969); Bringley v. C.I.T. Corp., 119 Fla. 529, 160 So. 680 (1935); Bell v. Niles, 61 Fla. 114, 55 So. 392 (1911). The detour is that Florida combines the common law action of detinue with the end sought in replevin, and uses Chapter 78, Florida Statutes (1969) to accomplish both ends. Miller v. Townhouse Development Corp., 178 So. 2d 730 (Fla. 3rd Dis. 1965).

Today, in certain quarters, there is an apparent impatience with common-law remedies. The tendency is to treat a vintage remedy such as replevin as little more than an anachronism. Because it is old, it is deemed to be useless; an historical curiosity, ill-suited to cope with legal problems of sweeping social change. Because it has come down to us through ages of English common-law respect for property and the rights of property-owners, replevin is immediately suspect by some as no more than an archaic buttress to the established order of things. This view is implicit throughout briefs of Appellant and opposing amici heretofore filed. It is submitted that, while superficially scintillating, this attitude toward a 'time-honored' remedy overlooks hard facts of commercial life. It also denies lessons of case law. If anything, presumptions in favor of the constitutionality of a statute are particularly strong where such constitutionality has

long been acquiesced in. Cf. Life & Casualty Ins. Co. of Tenn. v. Barefield, 291 U.S. 575 (1934); Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U.S. 566. Continued and unquestioned operation of a statute is entitled to weight and is highly persuasive of validity. Corn Exchange Bank v. Coley, 280 U.S. 218 (1930). As the Supreme Court of Florida has noted, old age alone is not sufficient to invalidate a statute. Statutes are not declared unconstitutional unless they conflict with the Constitution. McNeil vs. Webeking, 66 Fla. 407, 63 So. 728 (Fla. 1913).

The remedy developed not to oppress the poor by repossessing property belonging to the rich, but to step in between two disputants and, by taking the property into custodia legis, preclude any urgent necessity for self-help on the part of either party or both. According to some authority it was developed to protect chattels of tenants from wrongful taking by their lords. T.F.T. Plucknett, A Concise History of the Common Law, 368 (5th ed. 1956); W. S. Holdsworth, A History of English Law, 284 (3rd ed. 1927).

Like most English common-law remedies, replevin was a legal machination devised to avoid a fuss. Courts weren't interested in helping the claimant keep his chattel, but in helping the king keep the peace. Cobbey on Replevin, Sections 1, 20 (1900). In discussing historical developments of the remedy, Cobbey states in Sec. 1, page 2:

"And the writ as used to-day, though one of the oldest writs known to the law, is just as much a matter of statute in its practical use and application as writs which were created by statute--with this difference: that while statutory writs are said to be in derogation of the common law, and the cases to which they apply must therefore be strictly limited to those covered by the legislative intent, the writ of replevin is a common-law remedy, and statutory enactments in regard thereto are said to be in aid of the common law, and therefore the class of cases to which such enactments apply will be enlarged rather than restricted. *** This tendency to enlarge the scope of the writ still exists, as is shown by recent legislative enactments and judicial constructions. In some states to-day an action of replevin may develop into a suit for damages pure and simple. In others, an action to replevy personal property may be transformed into an equitable action to determine the title to the land which produced the personal property. Equitable principles should be applied in a replevin case. And in many states it may now be used to try the title as well as the right of possession of personal property. So that,

all things considered, it is one of the most important forms of action known to our system of jurisprudence."'

Sec. 20, page 11 of the treatise is also appropriate to this controversy.

"§20. Importance of the action.-- It is the only remedy for settling the right of possession of specific chattels. When we consider that the greater part of the wealth of the world is in personal property, we see at once the importance of this action. Both the legislatures and the courts have recognized its importance; and through their aid, what was in its origin a half civilized contest, in which brute force was a prominent factor, has grown and developed, with the growth and development of civilization, into an ever-ready instrument for the solving of the intricate problems arising out of the possession and ownership of such vast wealth. The peculiarities of the action also render it important. It is the only form of action where, on an ex parte showing by affidavit, property, the thing in controversy, is placed in the care of the plaintiff at the commencement of the litigation. For this reason the remedy has frequently been called a violent one; but the frequency with which it is appealed to, and the fact that

> the tendency of both the courts and the legislature, for the last one hundred years, has been to enlarge rather than restrict the scope of the action, not only shows that no evil effect has followed this feature of the action, but also evinces its importance and necessity."

Legislative history of the Florida statute discloses that the statute which Appellant would shrug off as archaic is paradoxically vital. The statute has been amended four times within the past two decades. Ch. 28277, §1, Laws of Florida, 1953; Ch. 29706, §1, Laws of Florida, 1955; Ch. 63-152, Laws of Florida, 1963; Ch. 67-254, Laws of Florida, 1967. This indicates considerable legislative interest. It also demonstrates a good-faith effort to keep pace with gradual changes in the State's commercial development.

Sections of the latest amendment to Chapter 78, Florida Statutes (1969) are before the court in this case. The controversy does not warrant judicial consideration of the entire statute, despite Appellant's vigorous assertions to the contrary. But it most certainly challenges Florida's right to enact a statutory scheme such as that set out in Chapter 78, and that is perhaps the root of Appellant's complaint.

In this regard, it should be noted that Florida is the real party-in-interest

Appellee here. Firestone Tire and Rubber Company is merely the via media through which Appellant and opposing amici seek to tear down the national structure of installment credit buying. For it is not the inner mechanism of Firestone's credit operations that is under attack, but the right of the state to enact legislation providing for pre-judgment repossession of personal property under a statutory scheme of replevin.

C. The purpose of replevin today is protection of property pending trial on the question of prior right to possession.

Within the context of facts before this Court, the purpose of the replevin remedy is preservation of personal property sold under a conditional sales contract pending a suit on the question of who has a prior right to possess the subject chattel. Protection of the property of its citizens and the economic life of its community are primary interests of the state. Therefore, a statutory scheme directed to these ends can hardly be dismissed as supportive of no significant state interest.

Mechanics of the economic factors affected by replevin are discussed in detail in the affidavit of Vincent G. Morgan (A 50-61). They are given judicial recognition in Epps vs. Cortese, 326 F. Supp. 127 (E.D.Pa. 1971) where at pages 135-136, a three-judge panel, discussing state interests in a replevin

context said:

> "Clearly, the State has a countervailing interest in summary seizure by replevin which is to be weighed against plaintiffs' right not to be temporarily deprived of their property prior to a hearing on the merits. Initially, summary seizure conserves State financial resources and administrative time in reducing the number of evidentiary hearings in a given lawsuit. Additionally, the State and creditor interests coincide in providing a protective remedy for those who have retained title to or security interest in specific and unspecialized property by authorizing procedures designed to prevent destruction, misuse or concealment of property by the debtor pending disposition. Adequate remedies made available to creditor interests are necessary to the preservation and continuation of retail credit upon which vast numbers of people must necessarily rely in a constantly inflated economy. To deny the creditor an adequate and practical remedy may deny the debtor of his only means of obtaining many widely accepted, but costly, items, the enjoyment of which should not be reserved to the wealthy. The preservation of adequate remedies is also necessary to the maintenance of many large and small retail businesses without which our economy might well

substantially decline to the detriment of the very individuals whom plaintiffs here seek to protect."

Clearly, the purpose of a statutory replevin scheme such as described in Chapter 78, Florida Statutes (1969) is salutary to areas of vital state interest and the proper subject of state concern.

D. Notice and opportunity for a hearing are present in Florida's replevin statute.

What is vital to due process within the perimeters of this controversy, was early defined by the Court as the opportunity to be heard in one's defense. See, Windsor v. McVeigh, 93 U.S. 274 (1876); Baldwin v. Hale, 1 Wall. 223 (1863); Hovey v. Elliott, 167 U.S. 409 (1897). Before one is deprived of property by adjudication, he must have opportunity for a hearing "appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). This requires that the opportunity be meaningful in time and manner. Armstrong v. Manzo, 380 U.S. 545 (1965). This assumes absence of an extraordinary situation when an overriding governmental interest may justify postponing the hearing until after the event. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Ewing vs. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950);

Fahey v. Mallonee, 332 U.S. 245 (1947). As to the time and manner and opportunity for a hearing, Mr. Justice Jackson recognized "limits of practicability," Mullane v. Central Hanover Trust Co., supra, and these limits should be measured by the facts of the particular case.

In Boddie v. Connecticutt, ___ U.S. ___, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971), Mr. Justice Douglas discussing due process noted in his concurring opinion:

> "Whatever residual element of substantive law the Due Process Clause may still have * * * it essentially regulates procedure."

Also concurring, Mr. Justice Brennan quoted from Cafeteria and Restaurant Workers Union vs. McElroy, supra, and Goldberg v. Kelly, 397 U.S. 254 (1970):

> "* * * [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Applying these due process requirements to procedures set out in the subject statute in light of the facts of this case, the inescapable conclusion is that no violation of the Fourteenth Amendment is presented here. The statutory scheme

satisfies rudimentary principles of fairness.

No unconscionable hardship is worked on Appellant as was present in Sniadach v. Family Finance, supra. Mrs. Fuentes was no stranger to a conditional sales contract or to installment credit buying. She had signed several similar sales contracts (A 24). The agreement expressly authorized repossession of the stove and stereo to protect the vendor's security interest; no unfairness is reflected in this contract. No burdensome loss was suffered by Mrs. Fuentes--the stove had been replaced with a new one and was outside on an open porch exposed to the elements (A 28; 82), and the stereo can hardly be considered a necessity in the same category as Mrs. Sniadach's salary or welfare payments in Goldberg v. Kelly, supra. Moreover, the initial replevy by the sheriff under Chapter 78, Florida Statutes (1969), is neither final nor determinative of the defendant's ultimate rights in the controversy. It is determinative only of actual possession of the property for a three-day period during which the defendant may match the bond posted by plaintiff and regain possession pending outcome of trial on the merits of the question: which of the two parties has priority of possession. The hearing, as to claims of both plaintiff and defendant, is yet to come. It presents as meaningful an opportunity to be heard 'within the limits of practicability' as is appropriate to the nature of the case. The necessary ingredients of

due process are present.

E. The ratio decidendi of Sniadach v. Family Finance is not appropriate to this case.

Appellant insists that replevin violates the Due Process Clause because it provides for a taking of property (even into custodia legis) without a prior evidentiary hearing. She further insists that the rule of Sniadach v. Family Finance, supra, leads inescapably to this conclusion. Mrs. Fuentes ignores distinctions between statutes providing for pre-judgment garnishment of wages and those providing legal processes for the immediate repossession of chattels. She also chooses to ignore the carefully drawn perimeters of the domain where Sniadach rules.

Sniadach dealt with pre-judgment garnishment of wages to satisfy a debt due under a promissory note to a loan company. We are here concerned with a retain-title contract for the conditional purchase of a gas range which Mrs. Fuentes had used and then voluntarily replaced, and a stereo phonograph which can hardly be considered to be a necessity of life.

Sniadach's perimeters are carefully staked by the Court's characterization of wages as a "specialized type of property presenting distinct problems in our economic system." Perimeters are also marked by the possibility of "loss of a job" and the overriding

consideration that garnishment presents a "great drain on the family income." Another boundary marker is recognition that garnishment of wages can "drive a wage-earning family to the wall." Underlying this domain is the foundation that ownership of and unrestricted right to use wages is undeniably in the wage earner. He has earned them. None of these socio-economic elements, expressly carved into the Sniadach opinion, are appropriate to a controversy arising out of the buyer's default under a conditional sales contract.

Moreover, the Wisconsin garnishment statute made no provision for indemnity by way of bond in the event the writ was ultimately determined to have been wrongfully issued. Yet bonding requirements of the Florida statute discourages whimsical use of replevin procedures for the purpose of taking undue advantage of one who has lost his right to possess the property. To this extent, the replevin statute affords a measure of protection absent from criminal search warrant procedures.

Balanced against the temporary deprivation of possession and use of property pending final adjudication of the merits, is the whole fabric of consumer installment buying. See, affidavit of Vincent G. Morgan (A 50-61). In a real sense, today's consumers are beneficiaries of the installment buying system to the extent that mass-production merchandising enables retailers to sell at lower prices.

If retailers are required to prosecute to judgment to prove their right to be paid in full for what they sell, without replevin machinery, the cost of such suits would be added to the price, reducing mass-production benefits to the consumer. In large measure, Mrs. Fuentes is a beneficiary of the system she now seeks to attack.

Neither Sniadach nor Goldberg v. Kelly, supra, had the capacity to completely undermine an economic system. Yet that would be the effect of reversal in the instant case. Reversal here would ignore countless conditional sales contracts and seriously cripple our consumer oriented economy. It would also ignore established case law which stands for the proposition that prejudgment action under an ex parte writ involving property rights --or rights equally precious--do not offend principles of due process of law. Armstrong v. Manzo, 380 U.S. 545 (1965); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855); Davis v. United States, 328 U.S. 582 (1945); Phillips v. Commissioner, 283 U.S. 589 (1931); McInnes v. McKay, 127 Me. 110, 141 Atl. 699, per curiam aff'd, McKay v. McInnes, 279 U.S. 82 (1929); Coffin Bros. & Company v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1920); American Tobacco Co. vs. Werckmeister, 207 U.S. 284 (1907); Brunswick Corporation v. J & P, Inc., 424 F. 2d 100 (10th Cir. 1970); Epps vs. Cortese, 326 F. Supp. 127 (E.D. Pa. 1971), prob. juris. noted, 402 U.S. 994 (1971).

Mrs. Fuentes ignored her contract and now seeks constitutional authority for having decided not to pay for the goods she bought and used. The Due Process Clause should not be permitted to relieve dissatisfied customers from contractural obligations on grounds reflected in this record. For the Constitution protects contracts as well as the property which is the subject of them.

This Court reached a similar conclusion in McKay v. McInnes, supra, when it per curiam affirmed the Supreme Court of Maine in McInnes v. McKay, supra, which summarized the present question thus:

> "But although an attachment may, within the broad meaning of the preceding definition, deprive one of property, yet conditioned and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, we do not think it is the deprivation of property contemplated by the Constitution. And if it be, it is not a deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of 'due process of law' and 'law of the land' are satisfied. (127 Me 110, 116)."

It is submitted that the rationale of Sniadach and Goldberg is not so elastic that it can be stretched out of proportion in an attempt to blanket all instances of prejudgment action against a debtor with due process prohibitions.

Florida's replevin statute provides meaningful opportunity for a hearing. The due process clause is not offended. On due process grounds the District Court must be affirmed.

II

The Fourth Amendment does not prohibit reasonable response to a conditional sales contract requiring repossession of goods by seller on default of payments by a buyer.

A. Facts do not warrant consideration of Fourth Amendment issues raised by Appellant.

Appellant and opposing amici confuse the way things are with the way they think things should be--to the detriment of the question raised by Mrs. Fuentes' decision not to pay for the stove she had bought. Facts become obscured or omitted from consideration altogether. Cut off, as it were, from their operative facts, issues blur easily. An essentially simple question has become confused and complex.

Throughout their briefs, Appellant and opposing amici ground their argument on a single premise, that the state has no legitimate interest to protect in passing a replevin statute which provides for breaking a close if the officer serving the writ has been denied access to 'secreted or concealed' property. Sec. 78.10, Florida Statutes (1969); and that, therefore, the replevin of goods from Mrs. Fuentes' house was violative of the Fourth Amendment. This, of course, is no part of the instant controversy. No close has been broken. The officer serving the writ in this case was not denied access. The mechanics of Sec. 78.10,

Florida Statutes (1969) were not summoned up. The premise upon which Petitioner has based her argument is made of the straw of conjecture.

Two members of the three-judge panel found on stipulated facts and testimony adduced in court that there was no Fourth Amendment problem before them (A 67-68). Procedures authorized by Sec. 78.10, Florida Statutes (1969) were not invoked.

A preliminary question, then, is whether a statutory toe-hold obtained through the fact of replevin involving a peaceable entry of Mrs. Fuentes' home, will enable Appellant to challenge the entire length and breadth of Florida's legislative scheme before this Court?

No doubt that final authority for testing constitutionality of Chapter 78, Florida Statutes, is vested in the judiciary, Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), or that in a proper case, courts have not only the right but the duty to consider such questions, Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964), and to declare that invalid which is not minted in constitutional coin, Rosenberg v. United States, 346 U.S. 273 (1953). But courts have no power independent of the proper case to reach into the statute book, review, and annul duly enacted laws of a sovereign state. Williams v. Riley, 280 U.S. 78 (1929); Horne v. Federal Reserve Bank of Minneapolis, 344 F. 2d 725 (8th Cir. 1965). Unless

testing the Fourth Amendment mettle of Chapter 78, Florida Statutes, became necessary during the course of judicial proceedings, and unless the issue is sufficiently raised in the facts, the Court should not undertake to assess validity of the law. Rosenberg v. Fleuti, 374 U.S. 449 (1963); United States v. Hayman, 342 U.S. 205 (1952).

For the power to declare a legislative enactment void is a delicate one to be exercised cautiously, reluctantly, Winters v. People of the State of New York, 333 U. S. 507 (1948); United States v. Brown, 381 U.S. 437 (1965), and only when such exercise is unavoidable. Polar Ice Cream & Creamery Co. v. Andrews, 208 F. Supp. 899 (N.D. Fla. 1962) rev'd on other grounds, 375 U.S. 361 (1964). The constitutional test must be absolutely necessary to a determination of the merits. United States v. Hayman, supra. Constitutional questions should not be considered abstractly, hypothetically, or conjecturally. Peters v. Hobby, 349 U.S. 331 (1955). For to anticipate constitutional problems not before the Court in the instant controversy in order to test a statute which was never applied is beyond the judicial prerogative; the law must be valid or invalid measured by operative facts before the Court. Lovett v. United States, 66 F. Supp. 142, 104 Ct. Claims 557, aff'd 328 U.S. 303 (1946). That which might happen, but hasn't, is not an operative fact. Prospective conditions may never arise. Determining a case as far-reaching

as this one on conjectural conclusions is tantamount to deciding crucial socio-economic issues on the basis of mere abstractions. More is required. The issues must be measured in terms of specific facts in order that the Court may confine its decision to the case before it; Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969); United States v. Raines, 362 U.S. 17 (1960), particularly when constitutionality of a statute is raised. United Public Workers v. Mitchell, 330 U.S. 75 (1947).

It is clear that the facts of this particular controversy do not warrant this Court's consideration of the Fourth Amendment issues urged by Appellant.

B. A forcible entry to reposess goods in accordance with terms of a conditional sales agreement is not unreasonable and therefore not prohibited by the Fourth Amendment.

1. Assuming, arguendo, that Sec. 78.10, Florida Statutes (1969), were at issue in the instant case, assertions by Appellant and opposing amici that it permits the sheriff to make an 'exploratory' search or to rummage through the debtor's effects is misleading. At pages 29 - 30 of her Brief, Appellant describes the situation as follows:

"* * * If the occupant is not at home when the officer calls, or

> if he refuses entry, the officer is required to enter, by breaking with whatever force is necessary, and then to forage through the dwelling or building until he finds and removes the property. * * *"

This extraordinary interpretation reads requirements into Sec. 78.10, Florida Statutes (1969), that Appellee Robert L. Shevin, Attorney General of the State of Florida, is unable to find. The statute says nothing about the defendant being away from home. It speaks to property which is 'secreted or concealed'. The attendant meaning of those words describes a purposeful attempt to frustrate the writ, not to be innocently away from home. We must assume that statutes are applied in good faith (as the facts clearly indicate in this case) when we approach the question of their constitutionality. International Harvester Credit Corp. v. Goodrich, 132 N.Y.S. 2d 511, 284 App. Div. 604 (1954), affd. 124 N.E. 2d 339, 308 N.Y. 731, affd. 350 U.S. 537, 100 L.Ed. 729, 76 S.Ct. 621, (1955); Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A. 2nd 397 (1941); cf. Duke Power Co. v. Greenwood County, 91 F.2d 665 (4th Cir. 1937), affd. 302 U.S. 485, 82 L.Ed. 381, 58 S.Ct. 306 (1938). There is nothing whatsoever in these facts to support Appellant's abstraction. Sec. 78.10, Florida Statutes (1969), is not a license to poach randomly through constitutionally protected domain. It is much tighter than Appellant -- without any factual support whatever -- argues it to be.

The writ orders the sheriff to replevy certain specifically-described property from the possession of a specifically-designated individual at a stated address (A 38). The statute requires this. Sec. 78.08, Florida Statutes (1969). Forcible entry to effect such replevin is permissible only when the property is 'secreted or concealed', and then only after public demand for delivery has been refused. Sec. 78.10, Florida Statutes (1969).

Thus an innocent defendant would not be subject to forcible entry under Sec. 78.10, but only the defendant who seeks to frustrate effectiveness of the writ by concealing or secreting the chattel and by refusing delivery upon public demand by an officer of the issuing court. In this posture, it is clear that the chattel is being detained wrongfully.

Execution of the replevin writ under such circumstances is hardly unreasonable search and seizure. The replevin defendant is aware of the obligation to pay his debt. He is made aware of the writ and attendant claim. He is aware that an officer is serving it. He is aware that specific property is involved which precludes necessity for any 'search' whatsoever. (It is incredible to suggest that executing a writ of replevin on a stove involves a "foraging" or "exploratory search" or a "rummaging through the debtor's effects.") Not only do the facts of this case fail to support a Fourth Amendment attack on the subject statute, but the statute itself is capable of its own

defense. It requires action and limits authority of the sheriff to well within the scope of reason.

2. Appellant argues that the Fourth Amendment impact is so fatal to replevin procedures reflected in this case that 700 years of accepted judicial practice came to an abrupt halt the instant Deputy Sheriff Williams stepped through Mrs. Fuentes doorway. The cases do not support this conclusion.

Murray v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1855), relied upon by the court below, is one of the earliest statements of authority. Summary processes for collecting debts due the government were at stake. The government's use of a distress warrant without supporting oath or affirmation was necessary to an effective program. Defendant contended that the warrant, used in this manner, violated the Fourth Amendment. Said the Court at 59 U.S. 285-286:

> "* * * But this article has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part. The process, in this case, is termed, in the act of congress, a warrant of distress. The name bestowed upon it cannot affect its constitutional validity. In substance, it is an extent authorizing a levy for the satisfaction of a debt; and as no other authority is conferred, to make searches or

> seizures, than is ordinarily embraced in every execution issued upon a recognizance, or a stipulation in the admiralty, we are of opinion it was not invalid for this cause. * * *"

The next statement appeared in Boyd v. United States, 116 U.S. 616 (1866). The Court discussed differences between a general search, prohibited by the Fourth Amendment, and the more limited intrusion authorized by common law writs. In holding that entries pursuant to such writs are prohibited neither by the Fourth Amendment nor by the other Articles of the Constitution, the Court stated at 116 U.S. 624:

> "* * * The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution. . . ."

Since Boyd, the Court has uniformly held that forcible entries by authorized officials for the purpose of recovering personalty in response to a duly issued writ issued at the instance of one claiming a right to immediate possession offend no prohibition of the Fourth Amendment. American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907); Davis v. United States,

328 U.S. 582 (1945). Lower courts have followed this general rule. United States v. 935 Cases More or Less, Each Containing 6 No. 10 Cans Tomato Puree, 136 F.2d 523 (6th Cir. 1943); United States v. Eighteen Cases Tuna Fish, 5 F.2d 979 (W.D. Va. 1925). Also, see State v. Pope, 4 Wash. 2d 394, 103 P.2d 1089 (1940), which held that a Washington replevin statute providing for forcible entry violated no constitutional Amendment.

In Davis v. United States, supra, federal agents had entered defendant's premises to seize property which the government had the right to reduce to immediate possession. Speaking for the majority, Mr. Justice Douglas wrote, at 328 U.S. 590-591:

> "* * * The distinction is between property to which the Government is entitled to possession and property which it is not . . . . The distinction has had important repercussions in the law . . . . For an owner of property who seeks to take it from one who is unlawfully in possession has long been recognized to have greater leeway than he would have but for his right to possession. The claim of ownership will even justify a trespass and warrant steps otherwise unlawful."
> (Emphasis supplied.)

It is respectfully submitted that there is no authority whatsoever for condemning

forcible entry in a replevin context such as is prescribed by the Florida Statutes.

Appellants urge statements of the Court in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), as authority for removing the distinction between civil and criminal cases in the Fourth Amendment context. Appellee Robert L. Shevin respectfully submits that such distinctions are irrelevant to the issues before the Court. What is controlling is not whether forcible entry occurs during investigation of a crime or to replevy goods, but whether under the circumstances in either case, the entry is reasonable.

Appellees insist that assuming such entry were described in facts before the Court, it would not be unreasonable inasmuch as it would have arisen out of an attempt to frustrate execution of the lawful writ and inasmuch as the parties had agreed that repossession would occur. Case law of this and other courts supports Appellees' contention.

Appellant insists that forcible entry in a replevin context would violate Fourth Amendment prohibitions and offers only one case in support, a California decision affording no authority for its holding other than Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803). See Blair v. Pitchess, 96 Cal. Rptr. 42, 486 P.2d 1242 (1971).

Under this legal posture, and without a record of operative facts to substantiate a Fourth Amendment attack, it would be unusual, indeed, for this Court to undertake reversal of the lower court on this ground. Wyman v. James, 400 U.S. 309 (1971); United States v. Raines, 362 U.S. 17 (1960); United States v. Wurzbach, 280 U.S. 396 (1930); Heald v. District of Columbia, 259 U.S. 114 (1922); Collins v. Texas, 223 U.S. 288 (1912).

CONCLUSION

The Florida replevin statute comports with the requirements of the Due Process Clause of the Fourtheenth Amendment. Furthermore, the entry by the state official for the limited purpose of recovering property did not constitute an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. Appellant's attempt to have nullified this well-used and time-honored remedy of creditors in commercial and private transactions should be rejected. For reasons and upon authority set out above, the decision of the three-judge court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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